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Nos. ~~555~~, ~~556~~, ~~557~~, ~~529~~ Misc., ~~547~~ Misc.

MAY
JAMES R. BROWNING, Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1959

PETER CASELLA, PETITIONER

v.

UNITED STATES OF AMERICA

EMILIO D'ARIA AND JAMES LEO MASSI, PETITIONERS

v.

UNITED STATES OF AMERICA

JOSEPH PAUL LO PICCOLO, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES SANTORE, PETITIONER

v.

UNITED STATES OF AMERICA

LORENZO ORLANDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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No. 555

PETER CASELLA, PETITIONER *v.* UNITED STATES OF AMERICA

No. 556

EMILIO D'ARIA AND JAMES LEO MASSI, PETITIONERS *v.* UNITED STATES OF AMERICA

No. 557

JOSEPH PAUL LO PICCOLO, PETITIONER *v.* UNITED STATES OF AMERICA

No. 520 Misc.

JAMES SANTORE, PETITIONER *v.* UNITED STATES OF AMERICA

No. 521 Misc.

LORENZO ORLANDO, PETITIONER *v.* UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (V–R. 1–42) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1959. Petitions for a rehearing filed by petitioners D'Aria and Massi were denied on October 15, 1959. Petitions for a rehearing filed by petitioners Casella and Santore were denied on November 2, 1959.[1] By order of Mr. Justice Harlan, the time for filing petitions for certiorari was extended for all petitioners to December 1, 1959. The petitions for writs of certiorari were all filed on or before December 1, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. All the petitioners except Santore (No. 520 Misc.) question the sufficiency of the evidence to support their conviction and the applicability to them of the statutory presumption arising from possession.

2. Santore (No. 520 Misc.) presents the question whether he was entrapped as a matter of law.

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[1] The government filed a petition for rehearing *en banc* on October 16, 1959, to which the court of appeals ordered all defendants to file answering briefs. The government thereafter asked this Court for several extensions of time within which to file a brief in opposition, which requests were granted. Although the court of appeals has not yet finally ruled on the government motion for a rehearing, our brief in opposition is now filed in order to permit a ruling by the Court before the end of the term.

3. Orlando (No. 521 Misc.) presents the question whether a search warrant was sufficiently specific in its description of the premises to be searched.

4. Casella (No. 555) questions the propriety of a remark by the court to counsel and of the sentence imposed.

5. Lo Piccolo (No. 557) questions the trial court's rulings:

a. refusing to turn over the minutes of the grand jury testimony of government witnesses.

b. reserving its ruling on a motion for judgment of acquittal until the close of the case.

STATUTES INVOLVED

21 U.S.C. 173 provides, in pertinent part:

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. * * *

21 U.S.C. 174 provides, in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any

such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

* * * * * *

STATEMENT

I

An indictment returned in the Southern District of New York charged petitioners with various violations of 21 U.S.C. 173 and 174, as follows:

Count 1: sale, etc. of 17 ounces, 161 grains, of heroin on October 21, 1957 (naming petitioners Casella, Santore, D'Aria and Massi).

Count 2: sale, etc. of 16 ounces, 390 grains, of heroin on December 11, 1957 (naming Casella, Santore and Lo Piccolo).

Count 3: sale, etc. of 9 ounces, 197 grains, of smoking opium on December 19, 1957 (naming Casella and Santore).

Count 4: possession, etc. of 6 pounds, 6 ounces, 302 grains, of heroin on January 21, 1958 (naming defendants other than petitioners).

Count 5: conspiracy of all petitioners and others from September, 1957, through January, 1958, to conceal, possess, buy and sell narcotic drugs, alleging 32 overt acts (I–R. 17–27).

The district court, sitting without a jury, found all petitioners guilty as charged (I–R. 130; III–R. 328).

The evidence was developed primarily through the activities of two agents of the Federal Bureau of Narcotics, Marshall and Picini, who posed as narcotics buyers. From the order in which their contacts with petitioners were made, a brief outline of the relationship of the petitioners to each other and to the alleged conspiracy appears:

(1) Santore,[2] who arranged for the agents a number of purchases of narcotics in Philadelphia, after which he introduced them to

(2) Casella,[3] who agreed to supply the agents with unlimited quantities of heroin. After making various references to his "New York partners", he indentified them as

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[2] Found guilty on counts 1, 2, 3 and 5 (I–R. 130); sentenced to twenty years' imprisonment on each count, to be concurrent with each other, but consecutive to sentences in New Jersey and Pennsylvania (Pet. 3); affirmed by the court of appeals as to counts 1, 3 and 5; reversed as to count 2 (V–R. 34), Judge Byers dissenting (V–R. 37).

[3] Found guilty on counts 1, 2, 3 and 5 (I–R. 130); sentenced to twenty years on counts 1 and 2, to be concurrent with each other, and twenty years on counts 3 and 5, to be concurrent with each other but consecutive to the twenty years on counts 1 and 2 (II–R. 77); affirmed (V–R. 34).

(3) D'Aria and Massi,[4] who approved a delivery of heroin to the agents without immediate payment. The trail also led to

(4) Lo Piccolo,[5] who was the source from which the narcotics were obtained. Assisting Lo Piccolo was

(5) Lorenzo Orlando,[6] in whose residence a large quantity of narcotics and equipment was uncovered.

On appeal, the chief issue raised was the sufficiency of the evidence, particularly with respect to knowledge of illegal importation. The court of appeals held that, under 21 U.S.C. 174, knowledge of importation could be based on the presumption arising from possession, and that the required possession could be constructive possession, but that some possession by each defendant had to be proved in order to bring the presumption into play. On the basis that no possession, actual or constructive, had been shown, it reversed the convictions as to two co-defendants and also reversed the convictions of Santore and Lo Piccolo on count 2.[7] In other respects it affirmed the judgments below.

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[4] Found guilty on counts 1 and 5 (I–R. 130); sentenced to ten years on each count, to be concurrent (I–R. 147); affirmed (V–R. 34), Judge Hand dissenting (V–R. 34–36).

[5] Found guilty on counts 2 and 5 (I–R. 130); sentenced to twenty years on each count, to be concurrent (III–R. 328–329); affirmed as to count 5, reversed as to count 2 (V–R. 34), Judge Byers dissenting (V–R. 37).

[6] Found guilty on count 5 (I–R. 130); sentenced to five years; affirmed (V–R. 34).

[7] This aspect of its holding is presently being considered by the court of appeals *en banc*. See fn. 1, *supra*, p. 2. District Judge Byers dissented from so much of the judgment as granted reversal. Judge Hand dissented from the affirmance of the judgment as to D'Aria and Massi on the ground that the presumption created by 21 U.S.C. 174 could not be based on constructive possession.

II

In more detail the evidence was as follows:

A. *Count 1 (Transaction on October 21, 1957).* After the two agents, Marshall and Picini, had made a number of purchases of narcotics in Philadelphia, arranged through Santore, the latter agreed to introduce them to his "New York connection", for an agreed consideration (II–R. 14, 31). Accordingly, on October 16, 1957, the agents were introduced to Casella. At the first meeting Casella said that he had been told by Santore, who had arranged the meeting, that the two were interested in pure heroin, and that he could supply them "with amounts anywhere from a half a kilo to a ton of heroin with the quality just as it comes off the boat" (II–R. 15–16, 32). Arrangements were made for the purchase by the agents of half a kilo of heroin.

Casella told the two agents to meet him at the bar of the Hotel Lexington in New York on Monday, October 21, at 6:00 p.m. They were to park their car in a lot across the street from the hotel, where delivery of the drugs was to be made (II–R. 16–17, 32).

Marshall alone kept this appointment, explaining to Santore that he did not have the money, due to a sudden heart attack suffered by his partner. Santore placed the heroin in the trunk of Marshall's car, which was left in the parking lot, while the two went over to the hotel to discuss the situation with Casella. Casella said he would have to consult with his "partners" (II–R. 17–18).

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Meeting D'Aria and Massi* at the Paddock Bar, Casella was heard to say that he did not have the money; that "one of them" got sick and his partner came alone; that the package was in the trunk of their car; and that they were good for the money. D'Aria and Massi discussed the situation and eventually accepted Casella's suggestion that the delivery to Marshall be completed and that they come to Philadelphia the following Wednesday to get their share of the money (II–R. 55–60).

On Wednesday, October 23, D'Aria and Massi made the trip from New York to Philadelphia. While they were en route Casella and Santore accompanied Marshall from Philadelphia to the King Cole Motel, on the Black Horse Pike in New Jersey, where Picini paid them off. Casella told the agents that he was expecting his New York partners. Upon his return to Philadelphia, Casella met D'Aria and Massi, who had arrived in the meantime, and was closeted with them for about thirty minutes (II–R. 19–20, 33–34; IV–R. 47–50).

B. *Count 2.* On December 10, the two agents met with Casella and Santore at the Vesuvio Restaurant in New York to arrange for a delivery of heroin (II–R. 21–23). While arrangements were being made, Casella excused himself from the table and was seen talking with Lo Piccolo. When Casella re-

* At about 4:30 that afternoon, Santore Casella and D'Aria had been observed talking together in front of the Hotel Lexington. After a few minutes conversation, Santore and D'Aria left in a car driven by D'Aria (IV–R. 33).

turned to the table, he said that everything was arranged (II–R. 22, 35–36).

The following afternoon Casella went to the apartment house in which Lo Piccolo lived, where he remained for about thirty minutes (II–R. 37, 51). He then reported that a half kilo of heroin would be delivered to Marshall's room at the Edison Hotel that night at 9:00 o'clock. Casella stated that he wanted to give the room key to his people and it was accordingly turned over to him. Marshall drove him to Lo Piccolo's apartment and waited while Casella was gone for about twenty minutes (II–R. 24, 38, 51–52).

That evening at 9:00 o'clock, Ignazio Orlando was observed going to Marshall's hotel room, carrying a package. He unlocked the door, remained two or three minutes and then left, without his package (Tr. 508–511, 817–823). Orlando then got into a car in which Lo Piccolo was waiting and drove to the latter's apartment building (Tr. 373, 374, 511–513, 686, 687). In the meantime, Marshall went to his room and found the half kilo of heroin in the place agreed upon. Payment of $6,000 was then made to Santore, at Casella's direction (Tr. 113, 278, 823). The court of appeals reversed except as to Casella and Ignazio Orlando, who has not sought further review.

C. *Count 3.* On December 19, 1957, Marshall drove Santore and Casella to a point near the apartment building of Lo Piccolo. While Marshall waited in the car, the two petitioners entered the apartment building. Santore waited in the lobby, while Casella went to the apartment of Lo Piccolo. Voices were

heard within, following which Casella came out, carrying a package. He rejoined Santore in the lobby and Santore made delivery of two cans of opium* to Marshall back at the car (II–R. 26–27, 40–41, 52–53, 62–64). The court of appeals affirmed the conviction of Santore and Casella on this count.

D. On January 20, 1958, in the late afternoon, Ignazio Orlando delivered a package to Lo Piccolo's apartment. Immediately following, Lo Piccolo entered his apartment and pulled down the blinds. When young Orlando left, he went to the home of his father, petitioner Lorenzo Orlando, on Long Island. The light in an attic room (where a subsequent search under the search warrant discussed below uncovered a large quantity of narcotics) went on and then off. Young Orlando emerged from the house soon afterward, carrying a large package wrapped in the same manner but smaller than the package which he had earlier delivered to Lo Piccolo's apartment (III–R. 114–116; IV–R. 41–42, 53).

On January 22, 1958, the day fixed by Casella for a big delivery to be made at the King Cole Motel in New Jersey, young Orlando drove to the vicinity of Lo Piccolo's apartment house, where the latter joined him. They then drove together to the Long Island home of petitioner Lorenzo Orlando. Again the light in the attic room was seen to go on and then off, fol-

* These cans were to be samples of the opium to be delivered in a sale involving $100,000 worth of opium and $50,000 worth of heroin, the delivery of which, on January 23, 1958, resulted in the arrest of all the petitioners (II–R. 28–29, 42–43).

lowing which Lo Piccolo and young Orlando came out, carrying a box, the same in size and shape as that in which narcotics were found when Santore was arrested at the King Cole Motel a few hours later (III-R. 117-119, 165-170).

Lo Piccolo was arrested early the following morning, at which time he denied that he knew or had been with Ignazio Orlando. On petitioner's person at the time of his arrest was a road map of New Jersey, with the penciled notation, "Hammonton 4 miles—Black Horse" (III-R. 52, 107-109; IV-R. 76-77).

A search warrant was obtained for the premises of Lorenzo Orlando. In executing the warrant, the officers found a locked door leading off the bathroom (IV-R. 69). In response to the officers' inquiries, petitioner falsely stated that the rooms were rented to a man named Frank and his wife (IV-R. 70). Petitioner denied having a key, but a key fitting the lock was later found in petitioner's overcoat pocket (IV-R. 73). When the officers started to force the door, petitioner objected, saying the people might be sleeping (IV-R. 71). The agents broke through the door and found eighteen half-kilo bags. When asked what they were, Orlando answered that they contained heroin and admitted ownership (IV-R. 72).

ARGUMENT

1. In one form or another all of the petitioners (other than Santore) argue that the evidence was insufficient to show their implication in the conspiracy or to establish the kind of possession which would give

rise to the statutory presumption of knowledge of illegal importation.

a. Before taking up in detail the arguments made, we think it should be noted that, insofar as the sale of heroin is involved,[10] there was no need to rely on the statutory presumption as to any of the petitioners to establish knowledge of illegal importation. Since 1924 no heroin has been legally importable for any purpose and no opium could be imported for the manufacture of heroin. 21 U.S.C. 173, as amended by 43 Stat. 657. Since 1956 no heroin could lawfully be outstanding, even for scientific purposes. 18 U.S.C. 1402. The courts judicially notice that opium is not commercially grown in this country. *Biegler* v. *United States*, 86 F. 2d 41 (C.A. 7), certiorari denied, 300 U.S. 677; *United States* v. *One 1937 Hudson T. Coupe*, 21 F. Supp. 600, 603 (W.D. Ky.); *United States* v. *Yee Fing*, 222 Fed. 154, 156 (D. Mont.). It is a reasonable inference, therefore, that no one could deal in heroin on the scale here proved without knowing that it had to be illegally imported.

b. Beyond that, as appears from the Statement, *supra*, pp. 7–11, the evidence as to each of the petitioners was ample to show his implication in the conspiracy and sufficient possession to justify the statutory presumption. Even accepting the limitation of the court below that there had to be either direct proof of each petitioner's knowledge of illegal impor-

[10] Count 3 involved smoking opium rather than heroin. However, only Casella and Santore stand convicted on that count and, as to each of them, the sentence on that count runs concurrently with another sentence that involves heroin.

tation, or direct proof of his possession of narcotics, the court below found the test adequately met.

(1) As to Casella, there was proof of his knowledge of illegal importation. When he first met the agents, he said he could get them heroin just as it came from the boat. He was not limiting his remarks to any particular transaction, but referring generally to the heroin he would sell the agents. He was equally specific as to the opium involved in count 3 of the indictment. He stated that it "was supposed to come from Turkey and was called red Turkey smoking opium" (II–R. 21).

In addition, he himself carried the package of opium involved in count 3. Moreover, as to the other deliveries, the relationship between Santore and Casella was so direct that Santore's manual possession of the drugs at the time he made delivery was equally the possession of Casella. The situation presents no abstruse problem of "constructive possession." It is simply a case of *qui facit per alium, facit per se.* Cf. *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 347.

(2) D'Aria and Massi were clearly implicated in the conspiracy as partners of Casella. Although the proof related to their actions with respect to the events of count 1, their participation in that sale shows them to have been active participants in the conspiracy as a whole. They were the ones who had to decide whether delivery could be made although full payment had not been forthcoming. Thus they were the ones who had control of whether the narcotics would be turned over to the agents. Their participation was

much more intimate and direct than that of the minor retailers or deliverers in the cases on which these petitioners rely, where the Second Circuit held that a single isolated transaction was not a sufficient basis on which to bottom an inference of continuing participation in a conspiracy. (Pet. No. 556, 15–16).

These men were associated with Casella in a business in which they had a community of interest in the profits gained (as shown by their meeting in Philadelphia to divide up the payment on the first purchase of narcotics) and in the losses which might be sustained (as shown by their agreement in the Paddock Bar to take a chance on a delayed payment for the narcotics). The frequent reference by Casella to these men as partners was admissible as evidence after their participation in the conspiracy was established by independent evidence. *Glasser* v. *United States,* 315 U.S. 60, 74.

In view of that direct partnership relationship, the direct knowledge of Casella that the narcotics in which he was dealing were illegally imported, discussed *supra,* page 13, is attributable to his partners D'Aria and Massi. Cf. *Commissioner of Internal Revenue* v. *Tower,* 327 U.S. 280, 286; *Walling* v. *Plymouth Manufacturing Corp.,* 139 F. 2d 178, 182 (C.A. 7), certiorari denied, 322 U.S. 741.

Moreover, as noted, D'Aria and Massi had the final control of whether the heroin would be delivered to the agents on October 21. Thus, while they did not have manual possession of the narcotics, they had sufficient direct control to give rise to the statutory pre-

sumption. We think that this evidence meets even Judge Hand's test that the possession must be "unconditionally subject to the 'possessors' demand for custody," although we believe with the majority that that is too narrow a test.

Unless the legislative purpose was to confine the statutory presumption to the "smaller fry" in the illicit drugs traffic, possession should not be so constricted as to apply only to those who manually handle narcotics, or have equivalent control thereof. Judge Hand pointed out that 26 U.S.C. 4724, enacted five years after 21 U.S.C. 174, used the expression "possession or control," leading him to believe that possession alone should not be interpreted so as to include control. The use of additional clarifying words by a subsequent Congress does not, however, throw any appreciable light on the intent of the earlier Congress. It seems difficult to believe that Congress intended that one who has been shown to have the power to direct the disposition of narcotics could escape the effect of the statutory presumption by having some one else make delivery for him. Other circuits,[11] and the Second Circuit in previous opin-

[11] *Gallegos* v. *United States*, 237 F. 2d 694 (C.A. 10); *United States* v. *Chiarelli*, 192 F. 2d 528, 531 (C.A. 7); *Brown* v. *United States*, 222 F. 2d 293 (C.A. 9). *United States* v. *Landry*, 257 F. 2d 425 (C.A. 7), cited in the dissent, merely held, on the facts there presented, that a person other than appellant had actual control of the narcotics. During national prohibition, control of intoxicating liquor was interpreted as connoting possession. See *e.g.*, *Murphy* v. *United States*, 18 F. 2d 509, 512 (C.A. 8); *Bergedorff* v. *United States*, 37 F. 2d 248, 249 (C.A. 10). This is also the view in state narcotics cases. See *People* v. *Rodriguez*, 151 Cal. App. 2d 598, 312 Pac. 2d 272, 274; *People*

ions,[12] have rejected attempted distinctions between possession and control.

(3) Even though the court of appeals reversed Lo Piccolo's conviction on count 2 despite evidence that the narcotics there involved came from his apartment, the evidence of that fact, plus the evidence that Lo Piccolo was (together with Orlando) the source of the narcotics involved in count 2, clearly shows his implication in the conspiracy. When, added to that, he was shown actually to have carried a box similar to that in which narcotics were found on January 23, under circumstances which clearly justify the inference that the box he carried was the box involved in that sale (see the Statement, *supra*, p. 11), his conviction on the conspiracy count was properly affirmed. This petitioner is in error in his argument (Pet. No. 557, 16–20) that what the other defendants did (by going to his apartment and emerging with a package, etc.) cannot be considered against him until his connection with the conspiracy is otherwise established. The acts of the various alleged participants, established by independent observation, may properly be considered against all in determining whether a conspiracy exists and the nature thereof; it is only as to declarations made by others that there must first be proof of membership in the conspiracy. See

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v. *Lunbeck*, 146 Cal. App. 2d 539, 303 Pac. 2d 1082; *De Vine* v. *State*, 206 S.W. 2d 247, 249 (Tex. Cr. App.) and, also, *Republic of Hawaii* v. *Awai*, 12 Haw. 174.

[12] *United States* v. *Moia*, 251 F. 2d 255 (C.A. 2); *United States* v. *Cohen*, 124 F. 2d 164 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811; *United States* v. *Kronenberg*, 134 F. 2d 483, 484 (C.A. 2).

Lutwak v. *United States*, 344 U.S. 604, 617. Here the acts of the various defendants, when fitted together, show that Lo Piccolo was the supplier of narcotics. As the court below pointed out, that conclusion, established by independent evidence, is merely reinforced by statements made by Casella that Lo Piccolo was his "connection". The fact that Lo Piccolo did not know every member of the conspiracy does not serve to absolve him from responsibility as the supplier of narcotics. See *Blumenthal* v. *United States*, 332 U.S. 539.

(4) Orlando argues that his possession of narcotics does not show him to have been a member of the conspiracy and that, in any event, his prior conviction for the substantive crime made it improper to hold him for the conspiracy. The evidence, however, justifies the inference that, aside from the narcotics found by the search warrant, Orlando had had the narcotics involved in the delivery of January 23 and other narcotics handled by the conspirators as well. The narcotics found under the warrant serve merely to illuminate the prior evidence as to him and clarify his role. He was thus shown to be an active participant in the conspiracy, and responsible for the various sales made pursuant thereto. Hence his conviction for the narcotics found in his possession and not yet sold does not relieve him of responsibility for his part in the conspiracy relating to other prior sales.

2. Petitioner Santore (No. 520 Misc.) was not entrapped into the sales of narcotics in which he participated. He concedes (Pet. 6) that the government

testimony established sufficient excuse for the federal agents' first transaction with him, which preceded the transactions charged in this indictment, but argues that, at some indeterminate point in the dealings with the federal agents, continued trafficking with this petitioner became unconscionable because he was already so thoroughly enmeshed in the toils of the law. The short answer is that the first sale in New York will alone support his sentence.[13]

No authority is cited for the proposition that a certain limit should be imposed to continued dealing with a person who has thoroughly incriminated himself, and such a rule would be hopelessly vague and incapable of practical application. The obvious purpose of continuing to deal with, or through, this petitioner was to obtain further evidence as to the more important members of the conspiracy. Petitioner concedes that this is a proper purpose, but contends that it is morally wrong that these further transactions should be held against him.

The considerations urged are and should be of weight with the sentencing authority. Here they obviously were considered by the trial judge, who made all the sentences concurrent, although consecutive to the sentences in the Third Circuit. That

[13] Santore was convicted for participation in three sales made, respectively, on October 21, December 11 and December 19, 1957 (counts 1, 2 and 3) and for conspiracy (count 5). He was sentenced to imprisonment for twenty years on each count, to run concurrently, but consecutively to sentences imposed in the Third Circuit (I–R. 130). His conviction on count 2 was reversed (V–R. 34), Judge Byers dissenting (V–R. 37). As a second offender, petitioner was subject to a mandatory minimum of ten years on each count.

would seem to be a fair disposition of the case, in view of the huge extent of the operations in which this petitioner was taking part. Petitioner was quite willing, as long as the true identity of the two government agents was unknown, to go from one transaction to another. He and his immediate superior, Casella, urged the agents to take larger amounts of the narcotics (II–R. 20–25, 28, 34, 36). At no point can it be said that the federal officers held out inducements to the commission of crime to a person who would normally resist the temptation.

The difference of opinion between the majority and minority of the Court, expressed in *Sorrells* v. *United States,* 287 U.S. 435, and *Sherman v. United States,* 356 U.S. 369, is not relevant to this case. That difference was as to whether the questions of fact should be resolved by the court or by the jury. Since in this case the judge was, by agreement, sitting as the trier of fact, that question is not involved. The reasoning of neither the majority nor the minority in those cases would lead to a conclusion that there was entrapment in this case as a matter of law.

3. The affidavit for search warrant and the search warrant adequately described petitioner Orlando's premises (No. 521 Misc.). The description in both was of "the premises known as 164 Hill Street, Elmont, Long Island, New York, being a one family house" (Pet. App.).

Upon execution of the warrant, it developed that two families were living in the house, one by the name of Drago on the first floor, and petitioner and his wife on the second floor. However, the outside ap-

pearance of the house was that of a one-family dwelling and it appeared that some time previously, the exact time of which was not shown, the subdivision had been made without permission, contrary to local ordinances. As the court of appeals pointed out, law-enforcement authorities could not be charged with notice of something which had thus surreptitiously been done (V–R. 27–28).

The Fourth Amendment requires that search warrants particularly describe the place to be searched. The degree of particularity thus required necessarily turns on the facts of the individual case. A standard of reasonableness in such matters does not call for omniscience on the part of the authorities. They cannot reasonably be required to know that a house which, from the outside, appears to be occupied by one family has been altered inside, in violation of law, to house two families. Cf. *Carney* v. *United States*, 79 F. 2d 821, 822 (C.A. 6).

4. The various other matters raised do not require extensive comment.

a. Petitioner Casella (Pet. No. 555, 13–15) was properly sentenced. Sentences on counts one and two were each for twenty years, to be concurrent. In view of the fact that they involved separate sales of very substantial quantities of narcotics, they could properly have been made consecutive. The similar sentences on counts three and five, involving another separate substantive count and the conspiracy count, were likewise concurrent with each other, thereby eliminating any question of "cumulating sentences by verbal devices," as claimed by petitioner.

In sentencing petitioner, the court said (II R. 77):

> * * * and I will say this in front of Mr. Casella, that if he wishes he may make an application to reduce the sentence, provided proof is shown me that he is making a genuine effort to cooperate, and he knows what I mean by that.
>
> You can save yourself a lifetime in jail, Mr. Casella, but the only one who can help you now is yourself.

Petitioner does not directly challenge this statement of the court but urges that cumulation of conspiracy and substantive charges should be approved only when "scrupulous regard" is shown for the rights of the defendant. This argument fails at the outset because, as above noted, there is no cumulation of conspiracy and substantive charges; the sentence for conspiracy was made concurrent with the sentence for a substantive count. The total sentence imposed is not unusual for the heavy trafficking here proved.

b. Casella also cites as error a remark to counsel, made in response to an objection to an inoffensive leading question (Pet. No. 555, 15–18). Counsel for the government stated in the court of appeals that the remark was made in a facetious manner. The accuracy of this assertion seems to be borne out by the record.[*] In a long trial, which was before the court

[*] The question objected to and the ensuing colloquy were as follows (II R. 39–40):

> By Mr. WALSH [United States Attorney].
>
> Q. Now I refer you to December 19, 1957, and ask you if on that day you had occasion to meet James Santore?
>
> Mr. EDELBAUM. I object to it on the ground it is a leading question.

sitting without a jury, objection to the question as leading when it was obviously so framed merely for the purpose of expediting the hearing was so frivolous as to invite a humorous response from the court. It is significant that the only counsel raising the issue did not participate at the trial.

c. Petitioner Lo Piccolo (Pet. No. 557, 24–31) requested that he be allowed to examine the minutes of the grand jury or that the court examine such testimony for possible inconsistencies with the testimony of witnesses on direct examination (III–R. 23–24). Both requests were refused. On appeal, the court of

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The COURT. I will sustain the objection. But we will be here until the end of July.

Mr. EDELBAUM. It is very simple, if he asks a proper question, your Honor, without being here until the end of July.

The COURT. For each day we are here after the end of June, if there is a conviction, each defendant will spend five years more.

Mr. EDELBAUM. I don't want a long trial, believe me. I just wanted to point out to Mr. Walsh that the questions were leading. That was the only purpose of my objection, without him getting so excited.

The COURT. It is leading. No doubt about it.

Mr. EDELBAUM. And I haven't been objecting.

The COURT. And that is a typical leading question from a hornbook series lawbook.

Mr. WALSH. I don't deny that, your Honor, but I just wish, if counsel are going to object, that the objection be made.

The COURT. I wish he would do that right along to save us time.

By Mr. WALSH:

Q. After the incident you just testified about on December 11th, when did you next have occasion to meet Santos and Casella?

appeals directed the trial court to examine the minutes of the grand jury testimony of all government witnesses and to certify whether inconsistences existed. The trial court did so and certified that the only inconsistencies were of such a trivial nature that they could not have made any difference in its judgment on the facts of the case. The court of appeals stated, on its examination of the minutes, that it was in agreement with the certification (V–R. 29) and that, in view of the fact that this was a court-tried case, there was a sufficient compliance with the procedure followed in that circuit (V–R. 30).

That was a proper ruling. There was no showing of "particularized need where the secrecy of the proceedings is lifted discretely and limitedly." *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, 399. In view of that, petitioner received more than his due when the court of appeals required an *in camera* examination of the grand jury minutes. The time of such examination is of no significance in a case tried before the court. Nothing could be accomplished by ordering a retrial of the case in which the same examination would be repeated.

d. The court did not err in refusing to sustain petitioner Lo Piccolo's motion for judgment of acquittal at the conclusion of the government's evidence. The pertinent part of Rule 29 provides:

> * * * The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evi-

> dence is insufficient to sustain a conviction of such offense or offenses. * * *

Petitioner's contention that the evidence was insufficient to sustain the charge of conspiracy has already been dealt with, *supra*, pp. 8–11. The contention here made is that the court refused to make its ruling, as requested, at the close of the government's case. If there were any merit to the contention that the evidence was otherwise insufficient to sustain a conviction, and if such deficiency were supplied by the evidence given by the other defendants, petitioner's argument would be relevant. But here the government's evidence amply sustained the charges and the trial court stated that it did not consider any of the evidence given by the other defendants in arriving at its verdict of guilty as to this petitioner (V–R. 32–33).

Petitioner does not point to anything specific in the testimony of the testifying defendants which would sustain the case against him. Even if there were such testimony, a trained legal mind would have no difficulty in applying such evidence only to the defendants who had not rested. There is no reason for disbelieving the court's statement that it based its finding of guilt as to this petitioner solely on the government's evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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